Supreme Court, U.S.
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No. _____

IN THE SUPREME COURT OF THE UNITED STATES

Mark Kelly,
Petitioner,

VS.

United States Department of Labor,
Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO

The United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

Mark Kelly, pro se Petitioner
10955 South Fork Road, Dillsboro, Indiana 47018
(812) 667-6546

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QUESTIONS PRESENTED

1) Does the Administrative Procedure's Act (APA), the standard of review applied by the Sixth Circuit to the United States Department of Labor's (DOL) Administrative Law Judge (ALJ) and Administrative Review Board (ARB) violate the Petitioner's Fifth Amendment Right to due process by making it impossible to remedy frauds upon the Courts and DOL administrative process? Or does the APA prevent a reviewing court from reversal or other actions to remedy frauds upon the Court and obvious misconduct of the parties during administrative hearings?

2) Do firing theats found to be illegal adverse actions against employees for protected activities "expire with time", when no significant changes in circumstances surrounding the protected activities have occurred? Is it reasonable that employees should "forget and ignore" those firing threats?

3) Do employers' demands that a professional technical employee sign and certify technical documents as accurate with no discussion and "with no changes permitted" degrade that employee's position when the employee knows that the documents are technically flawed and conceal those flaws from other technical professionals? Are such employer's demands adverse action in that they change the employee's status from that of a subcontracted technical scientist obligated to report objective technical findings to the status of an advocate (ie, a salesman), who is expected to conceal defects and errors to benefit employers?

PARTIES TO THE PROCEEDING

Parties to this appeal appear in the caption of the case on the cover page. Parties to the original Department of Labor Complaint and the ALJ Case were: Mark Kelly, Complainant, 10955 South Fork Road, Dillsboro, Indiana 47018. Lambda Research, Inc. Respondent. Fair Lane, Cincinnati, Ohio. Paul Prevey, Owner, represented by Robert A. Dimling, Frost, Brown, and Todd, LLC, Cincinnati, Ohio.

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TABLE OF AUTHORITIES

SUPREME COURT

Bryson v. United States, 396 US 64

Bouie v. Columbia, 378 U.S. 347 (1964)

Chance v. Erickson, 96 US1395 (1998)

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LOWER COURTS

Bartlick v. United States Dept' of Labor, 73 Fd 100, 102 (6th Cir. 1996)

89 F. 3d at 1581

CONSTITUTION OF THE UNITED STATES

U.S. Constitution Amendment V

FEDERAL STATUTES AND REGULATIONS

Energy Reorganization Act (ERA), 42 USC 5851

Administrative Procedure's Act (APA), 5 USC 706.

Federal Rules of Civil Procedure, Rule 60 (b)

18 USC 1621

18 USC 1823

42 USC 5851

OTHER AUTHORITIES

Akerlof, G. A. "The Market for Lemons" in An Economic Theorist's Book of Tales, Cambridge University Press, 1984. P. 9.

Adamson, R. B (of GE), Franklin, D. G. eds. Zirconium in the Nuclear Industry. ASTM Special Publication 824.

Tasooji, A. et. al. "Modelling Zircaloy Stress-Corrosion Cracking: Texture Effects and Dry Spent Fuel Behavior". (ibid).

Hindle, E. D. et. al. "Variation in the Strain Anisotropy of Zircaloy with Temperature and Strain", (ibid).

Knorr, D. B. et al. "Influence of Crystallographic Texture and Test Temperature on Initiation and Propogation of Iodine Stress-Corrosion Cracks in Zircaloy", (ibid).

Materials Performance Targeted Thrust FY 2004 Projects. December 2004. US Department of Energy, Office of Civilian Radioactive Waste Management, Washington DC. Uses of data.

IAEA-TECDOC-1410 Delayed hydride cracking in zirconium alloys in pressure tube nuclear reactors. Final Report of a Coordinated Research Project, 1998-2002. October 2004. Edges and welds.

Science and Reactor Fundamentals -Materials. CNSC Technical Training Group. Chap. 4,0 Pressure Tubes and Fuel Bundles.

Citations of Opinions and Orders

Opinion No. 04-3727 of the United States Court of Appeals for the Sixth Circuit dated Sept. 29, 2005. (A1). Administrative Review Board (ARB) Case 02-075 dated March 31, 2004 (A6). DOL Administrative Law Judge (ALJ) Case 2000-ERA-35 dated April 26, 2002 (A11). Department of Labor Investigation Re: Lambda Research/ Kelly/ 26708 Dated July 27, 2000 (A 69).

Jurisdiction

The Sixth Circuit Court's Decision No. 04-3727 was filed on September 29, 2005. This Court has jurisdiction to review the Judgment of the Sixth Circuit Court pursuant to Title 28 U.S.C. § 1257(1).

Statutes and Constitutional Provisions.

The basis for Petitioner's Federal action complaint of violations of the Energy Reorganization Act (ERA) 42 USC5851. The Federal Rules of Civil Procedure Rule 60 (b) and Fifth Amendment of the Constitution are the basis of this appeal.

STATEMENT OF THE CASE

The Sixth Circuit erred in upholding the DOL rulings, preventing remedies for obvious frauds upon the DOL. In effect, these frauds violated petitioner's Fifth Amendment rights to due process. The Sixth Circuit erred in deferring to ALJ discretion in ruling that illegal adverse actions such as firing threats

expire with time. The Sixth also erred in upholding the ALJ ruling that changing the character of technical professional's conditions of employment are not illegal adverse actions.

BACKGROUND

Lambda Texture Analysis Problems.

The case concerns discrimination against Petitioner for his attempts to report testing defects to General Electric Nuclear Systems (GEN). GEN subcontracted Respondent Lambda to test and generate texture data for zirconium materials used as cladding material in nuclear reactors fuel rods. This testing from 1996 to 2000.

In all audits of Lambda procedures used do this testing, in many purchase orders, and in other communications, GEN specifically cautioned Lambda that "10CFR21 applies to the procurement" and Lambda's services could "if defective or non-compliant, contribute to significant radiological safety hazards" and that, because many suppliers are "not aware of the end use of the various product and services", the supplier could not evaluate defects, and was to notify GEN. Many GEN communications to Lambda specifically cite the ERA, 10CR21, and 10CFR50 (A84, A85-A87, A75).

DOL Respondent Lambda hired Petitioner Mark Kelly, a Ph. D. chemist with extensive experience in materials analysis, in July of 1998. Lambda owner, Director of Research, and President Mr. Paul Prevey (who holds a BS but no

advanced degree) promoted Petitioner to lab manager in December of 1998.

Within months, Petitioner found defects in zirconium analysis methods. These test problems became clear after discussions with clients, review of the procedure, and discussions with co-workers (A78, A87, A88). These testing defects, began at least as early as 1997 (ie, prior to Petitioner's employment at Lambda) and continued until discovered when Petitioner became manager. Lambda's QA Manager Perry Mason made a "90 degree rotation error" rendering texture data "wrong" from 1997 until Petitioner found the problem in Feb. 1999 (A78). Of eight projects reviewed for this rotation error, Lambda records indicate two were "definitely wrong", four appeared "incorrect" and "skewed", and one was "OK" (A75, A76). GEN's records from an April 1999 audit showed no notification of this problem. Other problems with the procedure were found during an April 1999 Lambda review of the texture analysis procedure. Lambda tapes recorded that Prevey told Lambda manager Mike Glavicik that it was a "serious mistake" to instruct technicians to follow the written procedure rather than follow Mason's unwritten texture analysis instructions (A87). Procedure problems, Lambda QA problems, and failure of Lambda QA Manager Mason to maintain, follow, and require technicians to follow the written procedures audited by GEN (A84) were identified (A78, A86). The testing problems resulted in erroneous rotations of results and distorted data. Resulting errors appeared in some reports sent to clients (A75, A76).

After resolution of the rotation error, in June

of 1999, GEN questioned one set of distorted data included in May 1999 report written and signed by Glavicik and also signed by Lambda QA. At GEN's request, Petitioner analyzed the sample and found errors arising from procedure failures and failure of a technician to follow procedures. Petitioner summarized the problems in a Quality Assurance Report (QAR) (A72-A75). This QAR recommended review of past reports for the data distortion and notification to GEN so they could assess the problem, noting this was required per 10CFR21 (A75). Both technician Barger and Petitioner signed the QAR.

Prevey refused to sign the QAR. Prevey added handwritten edits and demanded that Petitioner alter the QAR to remove descriptions of written procedure problems as "already present". Prevey demanded that Petitioner include the edits that GEN had been "already notified" and "data were reviewed-see attached list" (A74-A75).

The "attached list" (A75-A76) was the April 19 email describing Glavicik's review for the rotation error, which was month before the erroneous June GEN report was written. While the email clearly indicates that data in several reports sent to client over the years were "definitely wrong, it clearly refers to the 90 degree error, not the newly found GEN defect. The fact that the author of the email later authored the defective GEN report is yet another instance of Lambda's problems with the procedures used in the GEN texture analysis. Prevey's inclusion of the email as evidence of "review" of errors (referring to an email written months before) was irrelevant to the GEN problem. Prevey's edits conceals lack of review for this newly